Supreme Court, U. S.
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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1980

SOLO CUP COMPANY,

Respondent,

vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Seventh Circuit Court of Appeals decision and order for judgment should be reversed under *Erie* v. *Tompkins* for failure to follow settled Illinois law that an insurer*, under a contract of casualty insurance, has no duty to defend or indemnify its insured* in a suit against it which prayed for no damages but only for equitable relief.

II. Whether the decision of the Court of Appeals that Title VII discrimination suits premised on the theory of "disparate impact" do not allege "intentional" discrimination is contrary to the decisions of this Court.

III. Whether the decision of the Court of Appeals conflicts with decisions of other Courts of Appeals on the issue of whether permitting insurance against intentional wrongs would violate public policy.

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* The two parties to this proceeding are those named in the caption.

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STATUTES:

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §§ 2000e *et. seq.* (1979) ed. and Supp. III) [42 U.S.C.S. §§ 2000e *et. seq.*] 2, 3, 6, 9, 11

MISCELLANEOUS:

21 ALRF 492, §§ 3(a), 7 6

IN THE

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No.

SOLO CUP COMPANY,

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vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals entered April 11, 1980, which reversed the decisions of the District Court and ordered judgment against petitioner.

OPINIONS BELOW

The District Court's opinions have not been published. The Seventh Circuit Court of Appeals opinion was published in 619 F.2d 1178 (1980). These opinions are set out in the Appendix.

JURISDICTIONAL STATEMENT

(i) The decision of the United States Court of Appeals for the Seventh Circuit, which is here sought to be reviewed, was entered and an opinion published on April 11, 1980.

(ii) Rehearing was denied on May 16, 1980.

(iii) Jurisdiction is conferred by 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 USC §§ 2000e et seq. in applicable part:

"5. (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than

discrimination on account of race, color, religion, sex, or national origin or in violation of section 794(a).

STATEMENT OF THE CASE

Solo Cup Company (Solo) brought a diversity action in the District Court seeking a declaration that it should have been indemnified and defended under a contract of casualty insurance issued to it by Federal Insurance Company (Federal) for the amounts paid by Solo in settlement and defense of an employment discrimination suit brought against it by the Equal Employment Opportunity Commission (EEOC) in the Northern District of Georgia pursuant to Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-5(g). The agency had sought injunctive and remedial relief for certain alleged acts of intentional discrimination and Federal had denied coverage for Solo's tender of the suit on the grounds that its policy covered only unintentional discrimination.

The contract in issue required that Federal indemnify Solo against losses resulting from liability for any occurrence for which damages were sought. Occurrence was defined as:

> "an accident or happening or event or a continuous or repeated exposure to conditions which unexpectedly and *unintentionally* results in personal injury." App. 46a.

The word "discrimination" was included in the list of occurrences called "personal injury", App. 45a. A separate endorsement required defense by Federal only of suits resulting from an occurrence, and also seeking damages. App. 47a.

On motion the district court granted a summary judgment for Federal and against Solo, App. 19a, 24a, holding

that the allegations of the EEOC complaint controlled, that intentional discrimination was not covered by the insurance contract, and that therefore Federal had no duty to indemnify or to defend.

On appeal, the Seventh Circuit, agreeing with the district court, held that the Policy did not cover the EEOC complaint insofar as it alleged discrimination arising from "disparate treatment" as described in this court's decision in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335 n. 15, 52 L.Ed 2d 396, 97 S.Ct. 1843 (1977). In the view of the court below, such discrimination was intentional and therefore outside the contract which covered only unintentional occurrences. App. 11a-12a.

The Court below, however, also concluded that the EEOC complaint potentially contained a claim for discrimination arising from "disparate impact" within the meaning of *Teamsters, supra,* 431 U.S. 335 n. 15. This exposure, the court held, was within the contract and hence Federal breached its agreement of insurance in not defending Solo against it. Accordingly, the court of appeals reversed the district court's ruling on the duty to defend issue and, on a further principle that an improper refusal to defend estops an insurer from denying coverage of the insured's substantive liability, entered judgment against Federal in the amount of Solo's settlement with the EEOC less deductibles under the Policy plus Solo's costs of defense. The court did not say that disparate impact discrimination is unintentional or explain how coverage of such discrimination can be brought within a policy which insures only against unintentional risks.

REASONS FOR GRANTING WRIT

I.

THE DECISION AND ORDER OF JUDGMENT OF THE COURT OF APPEALS CONFLICTS WITH ILLINOIS CASE LAW AND THEREFORE VIOLATES THE REQUIREMENTS ESTABLISHED BY THIS COURT IN ERIE v. TOMPKINS.

As this is a diversity case, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1937) required that the Court below apply Illinois law to determine the scope of Federal's duty to defend under the contract of casualty insurance at bar. See also *Day & Zimmerman, Inc.* v. *Challoner,* 423 U.S. 3, 46 L. Ed. 2d 3, 96 S. Ct. 167 (1975), and *Miree* v. *DeKalb County,* 433 U.S. 25, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977).

Under Illinois law a casualty liability insurer is obligated to defend a suit if the complaint alleges facts which bring the claim potentially within the coverage of the policy. *McFadyen* v. *North River Insurance Co.,* 62 Ill. App. 2d 164, 209 N.E. 2d 833 (2nd Dist. 1955); *Midwest Contractors Equipment Co.* v. *Bituminous Casualty Corp.,* 112 Ill. App. 2d 134, 251 N.E. 2d 349 (1st Dist. 1969); *Colton* v. *Swain,* 527 F.2d 296 (7th Cir. 1975) (applying Illinois law). Since the EEOC complaint alleged only acts "intentionally" engaged in, App. 41a, and since Federal's insurance policy covers only acts which "unintentionally" produce injury, App. 46a, no claim potentially within the policy is alleged and there was, therefore, no duty to defend.

It makes no difference to the insurance coverage in this case that, as the Court below contends, 619 F2d at

1187, arguendo a "disparate impact" claim[1] could have been proved under the allegations of the EEOC complaint. The casualty policy here in question has two basic contractual agreements: first, to indemnify, App. 44a, and second, to defend, App. 47a, but both also require that the suit seek damages. The only relief permitted in an Agency[2] action for disparate impact under Title VII, and the only relief requested by the EEOC in its complaint, was equitable in nature, *i.e.*, an injunction, an affirmative action program, and back pay.[3] App. 42a

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[1] See *infra*, p. 9 and *Teamsters* v. *United States*, 431 U.S. 324, at 335 n.15; 52 L.Ed. 2d 396, 97 S. Ct. 1843 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed. 2d 158, 91 S. Ct. 849 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 45 L.Ed. 2d 280, 95 S. Ct. 2362 (1975).

[2] 42 U.S.C. §2000e-5(g), under which the EEOC complaint was brought provides in relevant part: "If the court finds [an unlawful discrimination] the court may enjoin . . . order such affirmative action as may be appropriate . . . or any other *equitable* relief. . . . (emphasis added)

[3] It is settled that a back pay award is strictly equitable in nature, and is not an element of casualty damages. *NLRB* v. *Jones & Laughlin*, 301 U.S. 1, at 48, 81 L.Ed. 893 at 918, 57 S. Ct. 615 (1937), *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 45 L.Ed. 2d 280, 95 S. Ct. 2362 (1971) (including Justice Rehnquist's special concurrence); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 at 802 (4th Cir. 1971); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 at 1125 (5th Cir. 1969); *Morelock* v. *NCR Corp.*, 546 F.2d 682 at 687 (6th Cir. 1976); see also 21 ALRF 472, §§3(a), 7; *Ladd Constr. Co.* v. *Insurance Co. of North America*, 73 Ill. App. 3d 43, 47, 391 N.E. 2d 568 (3rd Dist. 1979)

One year ago, the Illinois courts definitively ruled that a casualty insurer need not defend suits seeking equitable relief, even if they involve financial exposure to the insured:

> "[W]e fail to find any allegation by Burlington as to actual or direct damages to property, but instead Burlington sets forth allegations which would sustain a claim that it had suffered economic damages from loss of the use of its railroad tracks. Burlington's complaint did not seek monetary damages, but instead equitable relief in the form of a mandatory injunction which would require or command . . . [the insured] . . . to remove debris . . . which had slid or collapsed on the railroad's tracks."
>
> • • •
>
> 'The cost of compliance with the mandatory injunction is not reasonably to be regarded as a sum payable "as damages".' "
>
> • • •
>
> [Since the] court would not have been authorized to award damages . . . the insurance company had no corresponding duty to defend." *Ladd Constr. Co.* v. *Insurance Co. of North America,* 73 Ill. App. 3d 43, 45, 47, 48, 391 N.E. 2d 568 (3rd Dist. 1979)

Likewise the courts of Illinois have determined that there is no duty that a casualty insurer defend an equitable action on the possibility that a court might award damages even though none is asked:

> "Should we indulge in speculation as to whether a court by exercising its inherent power might award damages when none were sought and then conclude that such inherent power exists and insurance company must defend an action, then we would by speculation be altering the responsibilities between parties as set forth in an insurance contract. Moreover, a giant if not final step would have been taken in support of a proposition that an insurance company

> would be under an obligation to defend all suits, regardless of policy provisions or allegations contained in a complaint. Such a result could well create havoc as to both the insurers and the insureds." *Id.* at 48

Since *McFayden* and *Ladd* authoritatively establish that petitioner had no duty to defend in this case, the refusal[4] by the court of appeals to follow these Illinois decisions violates the command of this court in *Erie*. The decision and order of judgment[5] therefore impermissibly conferred upon a diversity plaintiff an advantage denied a plaintiff in the Courts of Illinois, and constitutes reversible error and a compelling reason to grant the writ of certiorari requested.

II.

THE DECISION OF THE SEVENTH CIRCUIT THAT TITLE VII DISCRIMINATION SUITS PREMISED ON THE THEORY OF "DISPARATE IMPACT" DO NOT ALLEGE "INTENTIONAL" DISCRIMINATION IS CONTRARY TO THE DECISIONS OF THIS COURT.

Title VII of the Civil Rights Act of 1964 prohibits intentional discrimination. The operative language of Title VII states:

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[4] Though urged on the court below by petitioner, App. 27a, and in oral argument and in its Petition for Rehearing, *Ladd* is not mentioned in the court's decision.

[5] Since Illinois law requires that before imposing an equitable estoppel to prevent the insurer from denying coverage the equities must be examined, *Thornton* v. *Paul*, 74 Ill.2d 132, 384 N.E.2d 335 (1979), *Reis* v. *Aetna Casualty*, 69 Ill. App. 3d 777, 387 N.E.2d 700 (1st Dist. 1979), the ordering of judgment by the court of appeals without examining the equities as required under *Erie* provides a further ground for granting the writ.

> "If the court finds that the respondent has *intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate. . . or any other equitable relief." 42 U.S.C. §2000e-5(g). (emphasis added)

The intentional discrimination proscribed by Title VII has been found to exist under either the theory of disparate treatment or the theory of disparate impact. The terms "disparate treatment" and "disparate impact" were defined by the U. S. Supreme Court in *Int'l Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977):

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.

Teamsters has amplified this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 28 L.Ed. 2d 158, 91 S.Ct. 849 (1971), a discrimination case based solely on what became the disparate impact theory. The *Griggs* rationale was that the "intention" required by the statutory terms of Title VII is present, regardless of the absence of overt intent, if the effect or consequence

of the employment practice was discrimination. In stating that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation", *Griggs, supra,* 401 U.S. at 432, 28 L.Ed. 2d at 165, 91 S.Ct. at 856, this Court necessarily determined that the failure to correct the discriminatory consequences of the employment practices constituted the congressionally required intent.

The error of the Seventh Circuit arose from an erroneous analogy of disparate impact discrimination and common-law negligence. The liability triggered by disparate impact however does not parallel the tort liability arising from negligence. In negligence one can plead an unintentional act with unintentional consequences to state a valid claim for damages. But no valid disparate impact discrimination case can be pleaded without intent as its key element, simply because intent is required by the terms of Title VII.

The court below therefore failed to follow the decisions of this court when it ruled, necessarily though not expressly, that the consequences or effects of discrimination in a disparate impact case are "unintentional" so as to require Federal to defend under a contract covering only unintentional occurrences. The practical effect of this erroneous ruling is radically to amend Title VII in a manner manifestly contrary to the intent of Congress by making actionable under the Civil Rights Act discrimination which is unintentional in every respect.

III.

THE COURT OF APPEALS RULING THAT DISCRIMINATION BY "DISPARATE IMPACT" UNDER TITLE VII CAN BE A SUBJECT OF INSURANCE COVERAGE IS IN DIRECT CONFLICT WITH THE GENERAL RULINGS THAT INSURANCE AGAINST INTENTIONAL WRONGS VIOLATES PUBLIC POLICY.

Inasmuch as the failure to correct the discriminatory effect or consequences of an employment practice (disparate impact) is an intentional wrong within the meaning of Title VII, §2000e-5(g), the Contract's provision excluding such coverage conforms to the public policy against insuring intentional wrongs. In analogous reasoning the Fifth Circuit held, in *St. Paul Ins. Co.'s.* v. *Talladega Nursing Home,* 606 F.2d 631 (5th Cir. 1979), that an anticompetitive effect, regardless of specific intent, must result from an inherent tendency to suppress competition, and therefore, for insurance purposes, the effect is an intentional wrong and may not be insured. The alleged antitrust violations in *St. Paul* were "almost certainly not *per se* violations", *St. Paul, supra,* p. 634, n.3, yet a "close reading of the complaint discloses that appellants are alleged to have committed a series of intentional acts, each of which was calculated" to be anticompetitive. *St. Paul, supra,* 634.

The Seventh Circuit Court of Appeals ruling, that disparate impact consequences are insured, violates the general public policy prohibiting insuring of intentional wrongs. *Industrial Sugars, Inc.* v. *Standard Accident Ins. Co.,* 338 F.2d 673, 676 (7th Cir. 1964).

The court below stated that although insurance against disparate treatment could violate public policy, 619 F.2d

at 1187, insuring against disparate impact would not, 619 F.2d at 1188, based upon a perceived assistance to affirmative action programs which insurance could provide. Such a concept either rewrites the contract which prohibits insuring against intentional wrongs, or would establish that disparate impact is not intentional, in which case it would not be actionable, in equity, under Title VII.

The decision of the Court below thus being in error. this Court should grant petitioner's prayer and issue the writ of certiorari.

CONCLUSION

For the reasons stated, the decision of the Seventh Circuit below is erroneous and should be reversed. Accordingly, the Petitioners request that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 79-1528

SOLO CUP COMPANY,

Plaintiff-Appellant,

vs.

FEDERAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 4540—Thomas R. McMillen, Judge.

ARGUED NOVEMBER 8, 1979—DECIDED APRIL 11, 1980

Before PELL and BAUER, *Circuit Judges*, and DUMBAULD, *Senior District Judge*.*

PELL, *Circuit Judge*. This is an appeal by the plaintiff Solo Cup Company (Solo) from a judgment in favor of the defendant, Federal Insurance Company (Federal). Jurisdiction is based on diversity of citizenship. The district court concluded that the law of Illinois governed substantive questions, and the parties do not challenge this determination on appeal. The principal issue presented for review is whether the lower court erred in holding that there was a lack of coverage under an insurance policy for sums paid in settlement of an employment discrimination action brought pursuant to Title VII of the

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* Senior District Judge Edward Dumbauld of the Western District of Pennsylvania is sitting by designation.

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1970 & Supp. II 1972).

I.

On January 24, 1974, Federal issued an "Umbrella Excess Liability Policy" to Solo which imposed both indemnity and defense obligations upon the insurer. The relevant indemnity provisions obligated Federal to secure Solo against any "ultimate net losses"[1] which it might suffer as a result of "occurrences" of covered "personal injuries."

An "occurrence" was defined as

> an accident or happening or event or a *continuous or repeated exposure to conditions which unexpectedly and unintentionally* results in personal injury . . . . All such exposure to substantially the same conditions existing at or emanating from one premise or location shall be deemed one occurrence.

Policy Definition 5. (Emphasis supplied.)

The term "personal injuries" was broadly defined in Policy Definition 2 to include

> bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful evictions, detention, malicious prosecution, *discrimination,* humiliation; also libel, slander or defamation of character or invasion of rights of privacy. . . .

(Emphasis supplied.)

Finally, covered "ultimate net losses" included not only sums the insured became obligated to pay through adjudication or compromise, but also

> sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or

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[1] Solo had no underlying insurance and Federal's liability, if found to exist, could be subject to a deductible of $10,000.

> appeal bonds, interest, expenses for . . . lawyers . . . and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder. . . .

Policy Definition 6.

In addition to the inclusion of defense costs as a part of the ultimate net loss for which Solo was entitled to indemnity, however, there had been added to the policy "Endorsement No. 1—Supplementary Payments," which imposed the following separate and distinct defense obligation upon Federal:

> It is agreed that, with respect to any occurrence not covered by the underlying policies . . . but covered by the terms and conditions of this policy . . . the company shall:
>
> (A) Defend any suit against the insured alleging such injury . . . and seeking damages on account thereof, even if such suit is groundless, false or fraudulent. . . .

While the policy was in force, Ann Willard, an employee in Solo's Atlanta, Georgia, facility, filed a charge with the Equal Employment Opportunity Commission (EEOC), in which she alleged that Solo's failure to promote her was sexually discriminatory. Thereafter, on May 6, 1976, the EEOC filed against Solo in the Northern District of Georgia an action seeking broad compensatory and injunctive relief for an alleged class of female discriminatees. The complaint included allegations of intentional discrimination.

Separately, on November 16, 1976, the General Services Administration (GSA) conducted an on site review of Solo's Grandview, Missouri, facility to determine whether Solo, as a government contractor, had complied with the mandate of Executive Order 11246 and its implementing regulations to refrain from employment discrimination. This compliance review resulted in an ad-

ministrative allegation that Solo had discriminated against seventy-two female employees with respect to initial job placement. While the GSA proposed that Solo pay the alleged discriminatees $266,667 in backpay and interest as a basis for conciliation, the record does not indicate that any debarment proceedings have been commenced against Solo to date to enforce its alleged liability.

In a letter dated February 17, 1977, Solo advised Federal of both the EEOC action[2] and the GSA compliance review, and asserted that both matters were within the coverage of the policy. Federal immediately disclaimed coverage as to the EEOC matter, and thereafter asserted in its answer to plaintiff's amended complaint below that the GSA review was merely investigative and that Federal therefore had no obligation to defend.

On May 4, 1977, Solo advised Federal of its intention to settle the EEOC litigation, and subsequently entered into a consent decree in the Northern District of Georgia. Pursuant to the terms of the decree, Solo paid the charging party, Anne Willard, $25,000. The decree recited, however, that its entry did not "constitute or operate as an acknowledgement or admission" that Solo had violated Title VII. *Equal Employment Opportunity Commission* v. *Solo Cup Company*, No. C 76-806 (N.D. Ga. May 31, 1977).

Solo then commenced this action seeking indemnity for legal fees, costs, and sums paid in settlement of the EEOC action, for legal fees paid in conjunction with the GSA review, and additionally a declaration of its right to indemnity for any sums paid as a result of the administrative claim of backpay liability.

The district court granted Federal's motion for summary judgment as to all issues. The court reasoned that Federal could have no indemnity or defense obligations toward Solo with respect to the EEOC action because the EEOC complaint contained allegations of intentional

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[2] No issue is raised regarding the timeliness of the notice to Federal.

discrimination which were inconsistent with the policy definition of an insured "occurrence." With respect to coverage of the claims related to the GSA review, the court held that the insurer had no duty to defend against administrative procedures, and that the question of whether any claim resulting from the GSA review could constitute an insured occurrence did not present an actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201, or Article III of the Constitution, U.S. Const. art. III, § 2.

II.

A. The EEOC Action

The contract of insurance at issue in this litigation imposed an absolute duty upon Federal to provide a defense in any actions filed against Solo charging the occurrence of an injury within the coverage of the policy. It is well settled under the law of Illinois that

> [this] duty to defend extends to cases where the complaint alleges several causes of action or *theories of recovery* against an insured, one of which is within the coverage of the policy while others might not be.

Maryland Casualty Co. v. *Peppers,* 64 Ill. 2d 187, 355 N.E.2d 24, 28 (1976) (emphasis supplied). An insurer may not refuse the tendered defense of an action unless a comparison of the policy with the underlying complaint shows on its face that there is no potential coverage. *Weed* v. *Ohio Farmer's Insurance Co.,* 53 Ill. App. 3d 826, 368 N.E.2d 1310, 1312 (1977). In making the comparison any ambiguous or equivocal expressions in the policy will be strictly construed against the insurer. *Pioneer Insurance Co.* v. *Alliance Insurance Co.,* 374 Ill. 576, 586, 30 N.E.2d 66, 71-72 (1940). *See generally* 7C Appleman, *Insurance Law and Practice* § 4683 (1979).

Solo contends, however, that even if Federal's refusal to provide a defense was proper under the above described duty of defense and was therefore not a breach of the agreement contained in Endorsement 1 of the

policy, quoted *supra*, Federal may nevertheless be required to indemnify Solo for the $25,000 paid in settlement of the underlying action if, on remand, a trier of fact concludes that Solo's actions toward Anne Willard were not "intentional" within the meaning of the policy. Solo bases this argument on the premise that because the duties of indemnity and defense contained in the insurance contract are independent covenants, the mere fact that one covenant has not been breached does not preclude an opposite conclusion with respect to the remaining covenant.

While it is true that the obligations of indemnity and defense contained in the contract are independent of each other, we are unable to agree that Federal may, absent the existence of a duty of defense regarding the EEOC claim, have any obligation of indemnity for the sums paid in settlement of that claim. This follows from the fact that under Illinois law, a duty to defend such as is embodied in this contract of insurance, is broader than a general duty to indemnify for liabilities, fees, and costs. *Colton* v. *Swain*, 527 F.2d 296, 301-302 (7th Cir. 1975) (applying Illinois law).

The defense obligation is triggered when the insured tenders the defense of an action against it which is *potentially* within the policy coverage. By contrast, the indemnity obligation at issue here matures only when the insured becomes obligated to pay by reason of liability imposed by law. An insurer whose policy has an assumption of defense clause will therefore frequently have an independent duty to defend actions which will not ultimately result in an obligation to indemnify, either because the insured was not adjudged liable or because the facts were resolved in such a way as to bring the matter within a policy exclusion.[3] Conversely, litigation over

[3] The proper course of action for an insurer who disputes coverage, but nevertheless has an obligation to defend an action is set forth in *Maryland Casualty Co.* v. *Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976). The insurer should

the independent duty to indemnify will result only: (1) when the insurer has already defended the action under a reservation of rights, the insured has been found liable, and the insurer thereafter contests the coverage of the policy, or (2) when the policy contains no defense clause. If the broader duty to defend has not been triggered, it is because the underlying action is not potentially within the coverage of the policy, and there could be, as a practical matter, no duty to indemnify in such a situation.

Therefore, because Federal refused to assume the defense of the EEOC action, our analysis here necessarily focuses on whether that refusal was a breach of the duty of defense covenant contained in Endorsement 1. In the event it was not a breach of that covenant of the insurance contract, our inquiry is at an end. If, however, we determine that the duty of defense was violated, the applicable Illinois law holds that the insurer is estopped to deny coverage, *Aetna Casualty & Surety Co.* v. *Coronet Insurance Co.*, 44 Ill. App. 3d 744, 358 N.E.2d 914, 917 (1976), and provides for the following broad measure of damages to the insured: (1) the costs of defending the suit; (2) the amount recovered from the insured, either by way of judgment or settlement; and, (3) any additional damages caused by the insurer's breach of contract, *see, e.g., J.L. Simmons Co., Inc.* v. *Fidelity and Casualty Co.*, 511 F.2d 87, 90 (7th Cir. 1975) (applying Illinois law); *Weed* v. *Ohio Farmer's Insurance Company*, 53 Ill. App. 3d 826, 368 N.E.2d 1310, 1313 (1977); *Sims* v. *Illinois National Casualty Co.*, 43 Ill. App. 2d 184, 193 N.E.2d 123, 127 (1963); *see generally* 7C Appleman, *Insurance Law and Practice* § 4683 (1979), again obviating any additional inquiry into the duty to indemnify.

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[3] (Continued)
either seek a declaration of its rights in an independent action, or should defend under a reservation of rights, which it may do by assuming the defense, or, if necessary to avoid a conflict of interest, by means of independent counsel retained to represent the interests of the insured.

Federal contends that its refusal of the tendered defense[4] was proper because the underlying EEOC complaint against Solo included the following allegation:

> Since July 2, 1965, and continuously up until the present time, Defendant Company has *intentionally* engaged in unlawful employment practices at its Atlanta, Georgia facility, in violation of certain provisions of Title VII. These volations include, but are not limited to, the following:
>
> 1. Failing and refusing to promote women based on sex;
> 2. Compensating women at a lower rate than men for substantially the same work;
> 3. Maintaining job classifications segregated on the basis of sex;
> 4. Having different terms and conditions of employment for women based on sex; and
> 5. Discharging women in retaliation for exercising protected rights under Title VII.

(Emphasis supplied).

Reasoning that the extent of its obligation to defend should be measured by a comparison of the policy and the underlying complaint, Federal then argues that the act of the insured which is the subject of the suit must be an "occurrence." Because the policy defines an "occurrence" insofar as is relevant to this litigation as one which "*unintentionally* results in personal injury . . ." (emphasis supplied), Federal therefore insists that the inclusion of the word "intentionally" in the underlying complaint negated coverage and relieved it of its duty to provide a defense. We do not agree.

While it is true that an insurance company's obligation to defend depends upon the underlying complaint against its insured, this obligation, as noted previously, is present whenever there appears to be a *potential* for coverage under the policy. *Colton* v. *Swain,* 527 F.2d

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[4] Federal has not raised an issue as to the adequacy of the tender.

296, 302 (7th Cir. 1975) (applying Illinois law); *Maryland Casualty Co.* v. *Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976); *Weed* v. *Ohio Farmer's Insurance Co.*, 53 Ill. App. 3d 826, 368 N.E.2d 1310 (1977). Where, under the allegations of the pleadings against the insured, "an insured's liability exists on one *theory* as well as another and one of them brings the liability within coverage, we think the insured may avail himself of the insurance protection." *United States Steel Corporation* v. *Hartford Accident & Indemnity Co.*, 511 F.2d 96, 99 (7th Cir. 1975) (emphasis supplied) (applying Illinois law). Especially since the advent of notice pleading, in a case where there is doubt as to whether a theory of recovery within the policy coverage has been pleaded in the underlying complaint, the insurer must defend, and its defense obligations will continue until such time as the claim against the insured is confined to a recovery that the policy does not cover. *Carboline Company* v. *Home Indemnity Company*, 522 F.2d 363, 366-367 (7th Cir. 1975) (analyzing Illinois law).

To hold otherwise would be to place upon the insured the burden of demonstrating in advance of the underlying litigation which of the competing theories of recovery against it was applicable for purposes of insurance, thereby frustrating one of the basic purposes of such a clause in the insurance contract — protection of the insured from the expenses of litigation. *Aetna Casualty & Surety Co.* v. *Coronet Insurance Co.*, 44 Ill. App. 3d 744, 358 N.E.2d 914 (1976).

The underlying complaint filed against Solo by the EEOC seemingly alleges a full panoply of offenses under Title VII. Although based upon a promotional claim filed by a single employee, it includes class allegations[5]

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[5] The EEOC complaint was filed before the decision in *EEOC* v. *D.H. Holmes Co., Ltd.*, 556 F.2d 787 (5th Cir. 1977), *cert. denied*, 436 U.S. 962 (1978). In that case, the Fifth Circuit held that when the EEOC alleges class discrimination and seeks relief for "those persons adversely affected," the suit is a class action and the EEOC must comply with the requirements of Rule 23.

of sex based discrimination in compensation, promotional opportunities, and job placement, as well as general allegations of discrimination in terms and conditions of employment.

A Title VII plaintiff may establish a violation under either the "disparate treatment" or the "disparate impact" theory. As the Supreme Court observed in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977):

> "Disparate treatment". . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . .

Id.

In our opinion, the allegations in the underlying EEOC complaint were so general that the EEOC would in all likelihood have been permitted to proceed under either theory. An analysis of the question of whether a disparate treatment claim would have been within the coverage of the policy necessitates an examination of the burdens of proof articulated for that type of action in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973), and its progeny. In order to establish a prima facie case under the disparate treatment theory, a plaintiff is required to show the following: (1) that he or she belongs to a protected group under the statute; (2) that he or she applied and was qualified for the job or promotion for which the employer was considering applicants; (3) that despite his or her qualifications, the applicant was rejected or was not promoted; and (4) that

after the plaintiff's rejection, the employer continued to seek or consider applicants of the plaintiff's qualifications.

In *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978), the Court defined the exact scope of the prima facie case, noting that it was not the equivalent of a finding of discrimination, but rather raises an inference that the defendant's acts, if not otherwise explained, were more likely than not based on a consideration of impermissible factors. The burden that shifts thereafter to the employer is consequently one of articulating a legitimate, nondiscriminatory reason for its employment decision. *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978). If the employer meets this burden, the plaintiff will then be given an opportunity to introduce evidence that the employer's proffered justification is a mere pretext for discrimination.

What emerges from an overview of the above burdens is that proof of discriminatory motive is critical in a disparate treatment action. *International Brotherhood of Teamsters* v. *United States, supra,* at 335-36 n.15. The establishment of a case unedr *McDonnell Douglas* is equated with proof of motive because

> we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration.

Furnco Construction Corp. v. *Waters, supra,* at 577.

While the concepts of motive and intent are not identical, we think in the narrow context of determining the scope of coverage under this insurance policy, there is a similarity. The policy definition of an insured occurrence would extend only to a liability incurred by reason of Solo's *unintentionally* exposing women to dis-

criminatory conditions. The extent of this coverage is therefore inconsistent with liability predicated on the disparate treatment theory since such a liability would necessarily involve a determination that Solo acted with a discriminatory motive or purpose.

We reach the opposite conclusion, however, with respect to the disparate impact theory, which is employed to analyze the validity of employment practices which are fair and neutral in form, but discriminatory in operation. The basic legal standards utilized in a disparate impact analysis were developed in *Griggs* v. *Duke Power Co.* 401 U.S. 424 (1971), and amplified in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Proof of motive is not required. *International Brotherhood of Teamsters* v. *United States, supra,* at 335-36 n.15.

In order to make out a prima facie case of discrimination under the disparate impact theory, the plaintiff is required to show only that the employer utilized a facially neutral criterion which resulted in selecting applicants for hire or promotion in a significantly discriminatory pattern. Once the employment standard is so shown to be discriminatory in effect, the employer then must meet the burden of showing that its standard bears a manifest relation to the job in question. If the employer can demonstrate the job relatedness of its standard, the plaintiff may then show that other selection devices without a similarly discriminatory effect will also serve the employer's interest in maintaining an efficient workforce.

Solo contended at argument that the basis of the underlying claim against it was in fact a disparate impact claim based on its policy of requiring sales experience as a prerequisite for certain promotions. This policy, according to Solo's summary of the EEOC's position in the underlying action, disqualified disproportionate numbers of women, who, as a group, tended not to have the required experience.

While there is nothing in the record below to enable us to make a clear determination of whether the EEOC's

complaint was in fact aimed at such a policy, we cannot, as noted previously, hold that the EEOC complaint did not contain a potential disparate impact claim. Since disparate impact liability does not require proof of discriminatory motive, and since Federal has, moreover, conceded that the policy covers at least some types of disparate impact claims,[6] we therefore hold that the disparate impact claim which could have been proved under the allegations of the underlying complaint was a claim potentially within the coverage of the policy. Consequently, under Illinois law, Federal has breached its duty to defend its insured in the action. *See generally Maryland Casualty Co.* v. *Peppers, supra,* at 28.

The final issue to be considered with respect to the EEOC claim is whether our construction of the policy to include coverage of disparate impact liability would, as Federal contends, render the insurance contract violative of the public policy against employment discrimination embodied in Title VII. It is well settled that "[a] contract of insurance to indemnify a person for damages resulting from his own intentional misconduct is void as agaist public policy and the courts will not construe a contract to provide such coverage." *Industrial Sugars, Inc.* v. *Standard Accident Insurance Co.,* 338 F.2d 673, 675 (7th Cir. 1964). This rule is based on the simple principle long ago stated by Judge Cardozo, that "no one shall be permitted to take advantage of his own wrong." *Messersmith* v. *American Fidelity Co.,* 232 N.Y. 161, 133 N.E. 432 (1921). Placing a limitation on the clear meaning of an insurance contract due to policy

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[6] Although it might seem that Federal's argument carried to its logical extreme would result in its purported coverage of "discrimination" as being without any real meaning, Federal argues otherwise, pointing out that there are instances of vicarious liability imposed by Title VII, caused by the acts of others, which liability is therefore unintentional as to the insured. We regard this approach as so narrow as to leave little real meaning to the purported coverage.

considerations, is, however, a restraint on the rights of private parties to fashion their own contract, *Union Camp Corp.* v. *Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978), and is a step which courts have taken only where contracts were argued to extend coverage to the knowledgeable and intentional, or the criminal wrongdoer. *Hartford Life Insurance Co.* v. *Title Guarantee Co.*, 520 F.2d 1170 (D.C. Cir. 1975); 1 *Couch on Insurance* 2d § 1.36 (1959 & Supp. 1978).

Because we have construed the policy to exclude coverage of disparate treatment liabilities, we do not consider whether the degree of motive which must be proved in that type of action would be equivalent to a knowledgeable and intentional wrong such as would void policy provisions purporting to cover those claims.

With respect to the coverage of disparate impact liabilities, there is clearly no basis for voiding or limiting the contract. An insured may incur liability or become involved in litigation under that theory as a result of its utilization of any of a variety of seemingly neutral selection criteria. We note our agreement with the opinion of the Court of Appeals for the Sixth Circuit in *L'Orange* v. *Medical Protective Company*, 394 F.2d 57, 60 (6th Cir. 1968), where that court, interpreting Ohio law, observed that "the violation of public policy is measured by the tendency of the contract to injure the public good rather than by actual injury under the particular circumstances."

We do not think that allowing an employer to insure itself against losses incurred by reason of disparate impact liabilities will tend in any way to injure the public good, which we equate here with that equality of employment opportunity mandated by Title VII. To the contrary, the fact of insurance may be helpful toward achieving the desirable goal of voluntary compliance with the Act. The statistical proofs in disparate impact actions, most particularly those involving employment testing, have become increasingly complex, and employers

now often retain batteries of experts to validate their selection criteria. Such complex analyses of employment standards, while apparently necessary in order to ensure that an employer's policies do not needlessly place a stumbling block in the way of women or minorities, may well become, as a practical matter, beyond the financial capabilities of all but the largest employers. The involvement of insurance in the field might, however, ease the burden on smaller employers by making claim prevention services available on a cost effective basis to help employers evaluate their employment standards. Workmen's compensation insurers have, by way of analogy, no doubt helped prevent numerous employee injuries, and it is not undesirable, nor inconceivable, that discrimination insurers might aid in preventing the injury of discrimination as well.

Because we have held that Federal breached its duty to defend its insured in an action which was potentially within the coverage of its policy, and because there is no public policy reason for limiting the contract, Solo is entitled under Illinois law to damages in the amount of the costs and fees involved in defending the action, and the sums paid in settlement of the claim, less the policy deductible.

B. The GSA Review

Solo also seeks a declaration that it is entitled to have Federal provide a defense with respect to the allegations of sex discrimination made by the GSA in its compliance review. It additionally seeks indemnity for the $3,750 in legal fees and costs already expended during the review, and further seeks a declaratory judgment that any sums it becames obligated to pay as backpay to female employees in the facility which was the subject of the GSA review will be within the indemnity coverage of the policy.

Dealing with these contentions in order, our review of the record does not indicate that Federal's defense obligations have been triggered by the events to date surrounding the compliance review. Our determination rests

upon the fact that the only "claim" which has so far been made against Solo is an administrative *proposal*[7] that Solo pay some $266,667 in allegedly due backpay as a *basis for conciliation.* Solo, has, however, refused to conciliate upon this basis. Moreover, this excerpt from Solo to Federal dated May 19, 1977, is itself illustrative of the remote and indeed speculative nature of any claims which might be made against Solo:

> Solo Cup Company denies that it is guilty of any such [backpay] deficiency because there are a number of available defenses to the allegation and in any event believes that the amount claimed is greatly exaggerated. As a result of refusing to conciliate this matter, *it is anticipated that some time in the future* there will be a hearing with respect to Solo's right to continue as a government contractor and there *might* be an action filed to seek backpay.

(Emphasis supplied.)

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[7] In the GSA matter there are no adjudicatory proceedings taking place in any forum; therefore we leave for another day the question of whether the duty to defend imposed by the provisions of the policy is necessarily confined to judicial proceedings. We do note, however, that the duty to defend in Endorsement 1 obligates the insurer to "defend any *suit* against the insured." The indemnity provisions of the policy, by contrast, obligate the insurer to indemnify Solo for all sums paid by reason of liability imposed "by law." In light of this language in the indemnity provisions, we think that the duty to defend "suits" might in some circumstances be triggered by adjudicatory proceedings before an administrative body. This conclusion follows from the fact that under Illinois law, the duty to defend, while independent of the duty to indemnify, is the broader of the two. Further, the word "suit" contained in the defense provisions is ambiguous, *see, e.g.,* Webster's New Unabridged International Dictionary (2d ed.) (defining "to sue" as "to seek justice or right . . . by legal redress"), and must therefore be construed liberally in favor of the insured. *J.L. Simmons Co., Inc.* v. *Fidelity & Cas. Co.,* 511 F.2d 87, 90 (7th Cir. 1975).

Because we have held that Federal's broad duty of *defense* has not yet been triggered, we must examine the question of whether Solo might be entitled to reimbursement of the $3,750 of fees and costs expended to date in conjunction with the review under the *indemnity* provisions of the policy. Because there have been no formal proceedings against Solo, and therefore, no "liability imposed upon the Insured by law" as required by Paragraph 4 of the indemnity coverage, we hold that it is not so entitled at this time.

Finally, we are in full agreement with the district court that the question of whether Solo would be entitled to indemnity for sums paid to female employees in any actions which might be brought either to debar Solo as a federal contractor or to seek backpay for alleged discriminatees is not ripe for adjudication. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides for a remedy only in cases of "actual controversy." The mere possibility that proceedings might be commenced against an insured regarding an act of the insured's as to which the insurer might contest coverage, is not sufficient to create a controversy within the meaning of either the Declaratory Judgment Act or Article III of the Constitution.

The district court erred, however, in granting the insurer's motion for summary judgment as to the GSA related allegations. The appropriate remedy where an action is found not to constitute a controversy is not judgment but dismissal. Fed. R. Civ. P. 12(h)(3).

REVERSED AND REMANDED, for entry of a judgment on Count I and an order of dismissal on Count II consistent with this opinion. The judgment of this court shall include costs to the appellant.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
May 16, 1980
Before
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

No. 79-1528

SOLO CUP COMPANY,

Plaintiff-Appellant,

vs.

FEDERAL INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77 C 4540
THOMAS R. MCMILLEN, *Judge*

On consideration of the petition for rehearing filed in the above-entitled cause by Federal Insurance Company, defendant-appellee, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior District Judge Edward Dumbauld of the Western District of Pennsylvania is sitting by designation.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4540

SOLO CUP COMPANY,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY,

Defendant.

DECISION ON PENDING MOTIONS

Plaintiff has filed a complaint seeking a declaratory judgment concerning whether or not the defendant is required to reimburse plaintiff for its defense and settlement of an E.E.O.C. action filed in the Northern District of Georgia and, in addition to such reimbursement, to defend plaintiff in a G.S.A. investigation concerning its racial practices in Grand View, Missouri. Defendant has filed a motion to dismiss the complaint or for judgment on the pleadings, and plaintiff has filed a motion for judgment on the pleadings with respect to the declaratory action portion of the complaint. We find and conclude that the defendant is entitled to most of the relief which it seeks.

The controversy involves defendant's "Umbrella Excess Liability Policy" which it issued to the plaintiff for the period January 1, 1974 through January 1, 1977. The defendant agreed to indemnify the plaintiff for all sums which the plaintiff became obligated to pay for damages and expenses on account of "Personal Injuries"; personal injuries expansively are defined in par. 2 of the Definitions to include such things as "malicious prosecution, discrimination, humiliation . . . invasion of rights of privacy. . . ." However, these injuries must be caused by or arise out of an "occurrence" which is defined in par. 5 as "an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury. . . ."

The complaint in the District of Georgia case was filed on May 6, 1976 and, we find, does not allege an "occurrence" as defined in the policy. Paragraph 7 alleges:

> Since July 2, 1965, and continuously up until the present time, Defendant Company has intentionally engaged in unlawful employment practices at its Atlanta, Georgia facility, in violation of certain provisions of Title VII. These violations include, but are not limited to the following:
>
> 1. Failing and refusing to promote women based on sex;
>
> 2. Compensating women at a lower rate than men for substantially the same work;
>
> 3. Maintaining job classifications segregated on the basis of sex;
>
> 4. Having different terms and conditions of employment for women based on sex; and
>
> 5. Discharging women in retaliation for exercising protected rights under Title VII.

None of the foregoing allegations constitutes an accident, happening or event. They allege a course of conduct, resulting in plaintiff's continuous or repeated exposure to conditions which it intentionally created and which resulted in the discrimination. This is not the type of risk intended to be covered by the policy.

Under Illinois law, which controls this case, the duty of an insurance company to defend is broader than the duty to indemnify and arises when the complaint potentially sets forth a situation covered by the policy. *Country Mutual Ins. Co.* v. *Murray*, 97 Ill. App. 2d 61 (2d Dist. 1968). A claim which potentially falls within coverage of the policy must be defended *unless* the complaint affirmatively alleges facts which, if proved, would exclude coverage. *John Mohr & Sons* v. *Hanover Ins. Co.*, 322 F. Supp. 184 (N.D. Ill. 1971). Although plaintiff correctly contends that superfluous and immaterial allegations of the complaint cannot control the duty to defend,

the gravamen of the E.E.O.C. complaint was to correct an allegedly intentional and unlawful employment practice which had continued for more than a decade. It sought a permanent injunction, an affirmative action program, and back pay for the women who had been discriminated against. Defendant was justified in not defending this case under the policy.

Also condition F of the policy requires that the insured notify the defendant in advance of any settlements above the retained limit, which is $10,000. Plaintiff has shown no such notice to the defendant in advance of paying the $25,000 in settlement. Nor did it even tender the defense to the defendant when it became apparent that the claim might exceed the retained limit. Therefore, plaintiff is not entitled to reimbursement for any portion of the settlement, even though the defendant refused to defend. In construing condition F, incidentally, the parties have not shown whether or not there was any "underlying insurer" who was obligated to defend the claim, but we will assume, for plaintiff's benefit, that either defendant or one of its assignees met this definition and that therefore there was an obligation under the policy to defend covered claims.

The G.S.A. demand in Missouri also involved alleged discrimination but did not result in any court proceedings during the life of the policy. The insuring agreement itself provides that the defendant indemnify the plaintiff "for damages direct or consequential and expenses, all as more fully defined by the term 'ultimate net loss', on account of: (i) Personal Injuries. . . ." However, ultimate net loss is defined in par. 6 as the amounts which the insured becomes obligated to pay "either through adjudication or compromise . . . and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder. . . ." This does not appear to us to require the defendant to defend against administrative procedures, particularly when they cannot be filed as a court action.

Whether any demand or letter from G.S.A. can constitute an "occurrence" within the definition of the policy, in our opinion, would depend upon the nature of the claims being made by the government. We do not find any such document in the record, but plaintiff alleges that the back pay claim involved 72 female employees for a two-year period from October 1974 through October 1976. Thus, the definition of an occurrence as an unexpected and unintentional repeated exposure to conditions seems to be lacking in the G.S.A. claim also. In view of the lack of evidence on this claim, we cannot at this time make a final determination of plaintiff's rights for settling any claims arising from the G.S.A. demand involving Grand View, Missouri, however.

The question arises why the crucial word "discrimination" appears in the insuring agreement if it does not cover these matters. In the context of this kind of insurance policy, it was probably intended to cover a claim by an individual or individuals for one act of discrimination which resulted in a claim or lawsuit by such persons. There is no evidence that the type of occurrences involved in this case were ever contemplated by the parties or intended to be insured against.

We do not reach the question of whether the plaintiff is entitled to any reimbursement for the settlement of the G.S.A. claim over and above the retained amount (prayer 5 of the Complaint) because of lack of evidentiary support.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant for judgment on the pleadings is granted as to prayers 1, 2, 3 and 4 of the Complaint. A status report will be held on the remaining portions of the Complaint on Monday, December 18, 1978 at 11:30 a.m.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

Dated: Nov. 27, 1978

UNITED STATES DISTRICT COURT
For The
Northern District Of Illinois — Eastern Division

Civil Action File No. 77 C 4540

SOLO CUP CO.,

Plaintiff,

vs.

FEDERAL INSURANCE CO.,

Defendant.

JUDGMENT

This action came on for (hearing) before the Court, Honorable Thomas R. Mc Millen, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that defendant's motion for summary judgment on count I of the amended complaint is granted. Defendant's motion for summary judgment on Count II of the amended complaint is also granted.

Dated at Chicago, Illinois, this 4th day of April, 1979.

H. Stuart Cunningham
Clerk of Court

By: Kathleen Branch
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 77 C 4540

SOLO CUP COMPANY,

Plaintiff,

vs.

FEDERAL INSURANCE COMPANY,

Defendant.

DECISION ON DEFENDANT'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ON THE AMENDED COMPLAINT

On November 27, 1978, this court entered a decision granting defendant judgment on the pleadings with respect to prayers 1, 2, 3, and 4 of the original complaint. That decision did not reach prayer 5 of the complaint, for lack of the necessary evidentiary support. Plaintiff was granted leave to file an amended complaint in lieu of a motion to reconsider this court's decision. Defendant moves to dismiss or for summary judgment with respect to the amended complaint. We reaffirm the reasoning of our November 27, 1978 decision, with certain clarifications.

Count I. Count I of the amended complaint incorporates prayers 1-3 of the original complaint. Plaintiff seeks reimbursement for the costs of defense and settlement arising from a civil action filed by the E.E.O.C. alleging discrimination at plaintiff's Atlanta, Georgia facility, and a declaratory judgment that plaintiff is entitled to insurance coverage and benefits for the ultimate net losses incurred from the discrimination alleged.

Without repeating the November 27, 1978 decision, our reading of the insurance policy and the complaint filed in the District of Georgia case is unaffected by the allegations of plaintiff's amended complaint. Plaintiff does allege that it tendered the defense of the action to this insurer, and that it notified defendant in advance of pay-

ing $25,000, in settlement of the action. Plaintiff also alleges that no underlying insurer was obliged to defend or indemnify against covered losses in the Georgia action. And condition F in the policy provides:

> The Insured shall be responsible for the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured which no underlying insurer is obliged to defend.

The matters raised by plaintiff are only incidental to the major issues in this portion of the case: the proper construction of the insurance policy and of the E.E.O.C. complaint filed against plaintiff in the District of Georgia. We will grant summary judgment for defendant on Count I of the amended complaint.

Count II. Count II of the amended complaint incorporates prayers 4-5 of the original complaint. Plaintiff seeks reimbursement for costs of defense already incurred from a General Services Administration on-site review of plaintiff's Grandview, Missouri plant. This review was to investigate whether plaintiff complied as a government contractor with Executive Order 11246, as amended, and related rules and regulations thereunder, which prohibit employment discrimination and require that an affirmative action plan be implemented to provide equal employment opportunity. Plaintiff also prays for a declaratory judgment that it is entitled to defense in that review, and reimbursement for the ultimate net losses incurred from the discrimination alleged pursuant to the G.S.A. review.

The amended complaint, as previously, alleges no more than administrative procedures, instituted by the G.S.A. to review plaintiff's conduct. We find that defendant is not required under the policy to defend against purely administrative procedures, as we held in the November 27, 1978 decision.

We previously declined to rule as to whether any demand or letter from the G.S.A. can constitute an "occurrence" within the definition of the policy, for in our

opinion that depends upon the nature of the claims being made by the government. Sufficient evidence was lacking for a final determination of plaintiff's rights for settling any claims arising from the G.S.A. demand, as the nature and scope of the government's demand was unclear on the record. We find that an appropriate basis for a ruling on this issue is still lacking in the record.

However, we find that this portion of plaintiff's claim does not present an "actual controversy," ripe for decision under the Declaratory Judgments Act and within the confines of Article III of the Constitution. Plaintiff merely alleges that the G.S.A. has found that the plaintiff was guilty of discrimination at its Grandview, Missouri plant, and that G.S.A. proposes, as a conciliation of the alleged discrimination, that plaintiff pay specified amounts of backpay and interest. Plaintiff does not allege that it has done so to date or that any court proceedings have been instituted.

While we have previously expressed our doubt that the G.S.A. claim is founded upon an "occurrence," as defined by the policy coverage provisions, we will dismiss the claim for indemnification of ultimate net losses under Count II of the amended complaint, for lack of subject matter jurisdiction under the Declaratory Judgments Act.

Finally, we call plaintiff's attorneys attention to F.R.C.P. Rule 11 which requires that an amended complaint be signed by at least one attorney of record.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that defendant's motion for summary judgment on Count I of the amended complaint is granted. Defendant's motion for summary judgment on Count II of the amended complaint is also granted. A Rule 58 judgment will be entered.

SO ORDERED.

/s/ Thomas R. Mc Millen
Judge, U. S. District Court

Dated: April 4, 1979

(Title Head — Abramson & Fox)

Law Offices
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500

October 9, 1979

Thomas F. Strubbe, Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60603

RE: Citation of Additional Authority
Under Circuit Rule 11
No. 79-1528, Solo Cup Co. v.
Federal Ins. Co.
Oral Argument Scheduled, 11/8/79

Dear Sir:

Pursuant to Circuit Rule 11, as amended March 30, 1979, Appellee respectfully cites:

> *Ladd Constr. Co.* v. *Insurance Co. of N. Amer.*, 73 Ill.App.3d 43 (Third Dist., filed 6/19/79, reported 8/15/79),

for the proposition that:

> The Complaint of the injured person, and not of the insured, controls the duty of the insurance company to defend under a casualty policy where damages are sought.

The cited case relates to pages 2, 4, 5 and 6 of Appellee's Brief.

A copy of this letter has been sent to counsel for Appellant.

Respectfully submitted,

/s/ John E. Guy
John E. Guy
Thomas M. Knepper
Abramson & Fox
One East Wacker Drive
38th Floor
Chicago, Illinois 60601
(312) 644-8500
Attorneys for Defendant-Appellee
Federal Insurance Company

Orig., 6 cc:
cc: Fox & Grove
JEG/kts

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CIVIL ACTION No. 77 C 4540

PLAINTIFF DEMANDS TRIAL BY JURY

SOLO CUP COMPANY, a Delaware corporation,
Plaintiff,

vs.

FEDERAL INSURANCE COMPANY, a New Jersey corporation,
Defendant.

AMENDED COMPLAINT

COUNT I

Plaintiff Solo Cup Company, by and through its attorneys, Shayle P. Fox and Russell M. Kofoed, for Count I of its Amended Complaint against Federal Insurance Company, states as follows:

1. Plaintiff Solo Cup Company (hereinafter referred to as "Solo") is a Delaware corporation with its principal place of business in Illinois.

2. Defendant Federal Insurance Company (hereinafter referred to as "Federal") is a New Jersey corporation with its principal place of business in New Yotk.

3. The matter in controversy, exclusive of interest and costs, exceeds $10,000.00.

4. On January 24, 1974, Federal issued to Solo an Umbrella Excess Liability Policy, ("the Policy") a copy of which is attached hereto as Exhibit A and incorporated herein.

5. The Policy provided in part as follows:

"DECLARATIONS . . .

Item 2. Policy Period: From 1-1-74
to 1-1-77 . . .

Item 4. Limit of Liability—as per Insuring Agreement II.

(a) Limit in respect of each occurrence $10,000.00

(b) Limit in the Aggregate for each Annual Period where applicable $10,000.00

(c) Retained Limit $10,000.00"

"1. Coverage

The Company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the Insured for all sums for which the Insured shall become obligated to pay by reason of liability

(a) imposed upon the Insured by law

or (b) assumed under contract or agreement by the Named Insured and/or by any officer, director, stockholder, partner or employee of the named insured, while acting in his capacity as such,

for damages direct or consequential and expenses, all as more fully defined by the term "ultimate net loss", on account of:

(i) Personal Injuries, including death at any time resulting therefrom,

(ii) Property Damage,

(iii) Advertising Liability,

caused by or arising out of each occurrence happening anywhere in the world.

2. Limit of Liability

The Company shall only be liable for the ultimate net loss the excess of either

(a) the amount recoverable under underlying insurances as set out in the attached schedule

or (b) the retained limit as stated in Declaration 4(c) in respect of each occurrence not covered by said underlying insurances, (hereinafter called the "underlying limits") . . ."

"THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS . . .

2. Personal Injuries

The term "Personal Injuries" wherever used herein means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, *discrimination,* humiliation; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities . . . (emphsais applied)

5. Occurrence

The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. Ultimate Net Loss

The term "Ultimate Net Loss' shall mean the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudi ation or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, permiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other per-

sons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees . . ."

6. On or about October 18, 1974, Anne Willard, an employee of Solo at that time, filed a Charge of Employment Discrimination against Solo with the Equal Opportunity Commission principally based upon her allegation that she was denied a higher paying position with the company by reason of her being a female.

7. Solo's denial of a higher paying position to Anne Willard in 1974 was a single act or occurrence as defined in the policy.

8. On May 6, 1976, on the basis of the Charge of discrimination filed with it by Anne Willard against Solo, the Equal Employment Opportunity Commission filed a Complaint against Solo in the United States District Court for the Northern District of Georgia, Eastern Division, as civil action No. C76-806A, (hereinafter referred to as the "Lawsuit") and had a Summons issued against Solo, a copy of each of which are attached hereto as Exhibit B and incorporated herein, in which the Equal Employment Opportunity Commission alleged that Solo was guilty of employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

9. By its letter of February 17, 1977, to Critchell-Miller, Inc., an authorized agent of Federal, a copy of which is attached hereto as Exhibit C and incorporated herein, Solo gave due notice to Federal of said occurrence of discrimination alleged by Anne Willard, an ex-employee of Solo, on whose behalf the Equal Employment Opportunity Commission had filed the Lawsuit.

10. On or about February 17, 1977, Solo tendered to Federal the defense of the Lawsuit and requested Federal to acknowledge its coverage under the policy.

11. By its letter of February 18, 1977, to Solo, a copy of which is attached hereto as Exhibit D and incorporated herein, Critchell-Miller, Inc., an authorized agent of Federal, acknowledged receipt of Solo's letter to it dated February 17, 1977.

12. By its letter of March 1, 1977, to Solo, and attached Chubb Chicago Claims Office Notice of Loss Acknowledged form dated February 23, 1977, a copy of which are attached hereto as group Exhibit E and incorporated herein, Critchell-Miller, Inc., an authorized agent of Federal, acknowledged the receipt of notice of the occurrence of discrimination alleged by Anne Willard on whose behalf the Equal Employment Opportunity Commission had filed the Lawsuit, and Chubb/Pacific Indemnity Group, an authorized agent of Federal, specifically acknowledged Solo's notice of loss and specifically requested its Atlanta, Georgia office to handle Solo's loss.

13. By its letter of April 1, 1977 to Solo, a copy of which is attached hereto as Exhibit F and incorporated herein, Chubb/Pacific Indemnity Group, an authorized agent of Federal, denied that the Policy provided Solo with any coverage for said occurrence of alleged discrimination and refused to pay any expenses and any portion of the damages which Solo would suffer from the Lawsuit.

14. By his letter of May 4, 1977, to Ray McCully of Chubb/Pacific Indemnity Group, an authorized agent of defendant Federal Insurance Company, a copy of which is attached hereto as Exhibit G and incorporated herein, Shayle P. Fox, attorney for Solo, requested approval of Federal to settle the Lawsuit by paying $25,000.00 to Anne Willard to make her whole for her loss of income during the two years from August, 1974, through August, 1976, which she alleged was due to the occurrence of alleged discrimination in denying her the higher paying position, and advised Federal that in the absence of any objection from Federal, Solo would proceed to settle the Lawsuit by a $25,000.00 payment to Anne Willard.

15. Having received no response to the Shayle P. Fox letter of May 4, 1977, to Ray McCully of Chubb/Pacific Indemnity Group, a copy of which is attached hereto as Exhibit G, Solo settled the Lawsuit on May 31, 1977, paid Anne Willard the sum of $25,000.00 in back pay, interest and damages arising from the occurrence of alleged discrimination, and in his letter of June 14, 1977, to Ray McCully of Chubb/Pacific Indemnity Group, a copy of which is attached hereto as Exhibit H, Shayle P. Fox, attorney for Solo, advised Federal that Solo had settled the Lawsuit and had paid Anne Willard the sum of $25,000.00 since Federal had never responded to his May 4, 1977 letter.

16. By its letter of June 22, 1977, to Solo, a copy of which is attached hereto as Exhibit I and incorporated herein, Ray McCully of Chubb/Pacific Indemnity Group, an authorized agent of Federal, again denied that the Policy provided Solo with any coverage for the occurrence of alleged discrimination and refused to make payment on any claims related to the Lawsuit.

17. Anne Willard, alone, received the entire sum of $25,000.00 paid by Solo to settle the Lawsuit and no other person or entity received any monies whatsoever from Solo in settlement of said civil action.

18. Solo had no underlying insurer who was obligated to provide coverage, or to pay any ultimate net losses, or to defend it in the Lawsuit which was based on the charge of discrimination filed with the Equal Employment Opportunity Commission by Anne Willard based on the said occurrence of alleged discrimination against Anne Willard.

19. In addition to $25,000.00 paid to Charging party, Anne Willard, Solo has paid $6,500.00 in fees for legal services rendered and $1,200.00 in costs incurred to settle the Lawsuit.

20. Under the provisions of 28 U.S.C. 2201, Rule 57 of the Rules of Civil Procedure for the United States District Courts, and Section 57.1 of the Civil Practice

Act of Illinois, *Illinois Revised Statutes* (1977), chapter 110, section 57.1, this Court is empowered to make binding declarations of rights and obligations of the parties hereto under the terms and provisions of the Policy.

21. Any personal injury from discrimination which may have resulted to Anne Willard from the occurrence of Solo's refusal to grant her the higher paying job was unexpected and unintended by Solo.

WHEREFORE, plaintiff Solo Cup Company prays this Court for the following relief on Count I of its Amended Complaint against defendant Federal Insurance Company:

1. Pursuant to 28 U.S.C. 2201, Rule 57 of the Rules of Civil Procedure for the United States District Courts, and Section 57.1 of the Civil Practice Act of Illinois, *Illinois Revised Statutes* (1977) chapter 110, section 57.1, declare that Solo is entitled to insurance coverage and benefits from defendant Federal for the ultimate net losses incurred from said occurrence of discrimination alleged by Anne Willard.

2. Order Federal to pay Solo the sum of $7,700.00 to reimburse Solo for its payment of fees for legal services rendered and costs incurred and the sum of $25,000.00 to reimburse Solo for its payment of that sum to Charging party Anne Willard to settle civil action No. C76-806A brought by the Equal Employment Opportunity Commission against Solo formerly pending in the United States District Court for the Northern District of Georgia, Eastern Division.

3. Order Federal to pay Solo interest on all amounts this Court determines to be due from Federal to Solo from June 22, 1977, at the statutory rate.

4. Order Federal to pay Solo its reasonable attorneys fees incurred in this action.

5. Grant Solo such other relief as this Court may deem proper.

COUNT II

Plaintiff Solo Cup Company, by and through its attorneys, Shayle P. Fox and Russell M. Kofoed, for Count II of its Amended Complaint against Federal Insurance Company, states as follows:

1.-5. Solo realleges each and every allegation set forth in paragraphs 1 through 5 of Count I of its Amended Complaint as though set forth in full as paragraphs 1 through 5 of Count II of its Amended Complaint.

6. On or about November 16, 1976, and thereafter, the United States of America General Services Administration (hereinafter referred to as GSA) conducted an on-site review of the Grandview, Missouri, plant of Solo to investigate whether or not Solo, as a government contractor, had complied with Executive Order 11246, as amended, and rules and regulations promulgated thereunder, which prohibit employment discrimination and require implementation of an Affirmative action plan to provide equal employment opportunity. After the completion of said on-site review, GSA found that Solo was guilty of discrimination in employment opportunities arising from the initial placement of 72 female employees in cup packing area positions instead of higher paying entry level jobs and proposed as a conciliation of said occurrences of alleged discrimination, that Solo pay $266,667.00 in back pay and interest to said group of 72 female employees, a list of whom together with their date of hire is attached hereto as Exhibit J and incorporated herein, for all wages allegedly lost for the 2 year period from October, 1974, through October, 1976.

7. Solo's initial placement of said 72 female employees in cup packing area positions were 72 single acts or occurrences, with each act or occurrence involving one person only.

8. By its letter of February 17, 1977, to Critchell-Miller, Inc., an authorized agent of Federal, a copy of which is attached hereto as Exhibit C, Solo gave due notice to Federal of said occurrences of discrimination

alleged by GSA on behalf of a group of Solo employees at Solo's Grandview, Missouri plant.

9. By its letter of February 18, 1977, to Solo, a copy of which is attached herteo as Exhibit D, Critchell-Miller, Inc., an authorized agent of Federal, acknowledged receipt of Solo's letter to it dated February 17, 1977.

10. By its letter of March 1, 1977, to Solo, and attached Chubb Chicago Claims Office Notice of Loss Acknowledged form dated February 23, 1977, a copy of which is attached hereto as group Exhibit E, Critchell-Miller, Inc., an authorized agent of Federal, acknowledged receipt of notice of the occurrences of discrimination alleged by GSA on behalf of a group of Solo employees at Solo's Grandview, Missouri, plant.

11. By its letter of May 19, 1977, to Critchell-Miller, Inc. Insurance, an authorized agent of Federal, a copy of which is attached hereto as Exhibit K and incorporated herein, Solo notified Federal that as a result of GSA's on-site review and proposed conciliation at Solo's Grandview, Missouri, plant, GSA had found occurrences of discrimination against a group of 72 female employees resulting from their initial placement as cup packers rather than placement in higher paying entry level jobs, and requested Federal to state its position on Solo's claim for coverage under the Policy, a copy of which is attached hereto as Exhibit A.

12. Despite the request of Solo in its letter of May 19, 1977, a copy of which is attached hereto as Exhibit K, of Federal to state its position on Solo's claim for coverage arising from GSA's on-site review and proposed conciliation of occurrences of said alleged discrimination, Federal has failed and refused to date to state its position and is guilty of an anticipatory breach of the Policy.

13. Solo had no underlying insurer who was obligated to provide coverage, to pay any ultimate net losses, or to defend it from any claim or action brought against

it by the GSA based upon said occurrences of alleged discrimination by Solo against 72 of its female employees.

14. Through the date hereof, Solo has incurred $3,500.00 in legal fees for services rendered and $250.00 in costs incurred in the defense of said pending claim of GSA against Solo alleging occurrences of discrimination.

15. Any personal injuries from discrimination which may have resulted to said 72 female employees from the occurrence of Solo's initial placement of said employees in cup packing area positions were unexpected and unintended by Solo.

16. Under the provisions of 28 U.S.C. 2201, Rule 57 of the Rules of Civil Procedure for the United States District Courts, and Section 57.1 of the Civil Practice Act of Illinois, *Illinois Revised Statutes* (1977), chapter 110, section 57.1, this Court is empowered to make binding declarations of rights and obligations of the parties hereto under the terms and provisions of the Policy.

WHEREFORE, plaintiff Solo Cup Company prays this Court for the following relief on Count II of its Amended Complaint against defendant Federal Insurance Company:

1. Pursuant to 28 U.S.C. 2201, Rule 57 of the Rules of Civil Procedure for the United States District Courts, and Section 57.1 of the Civil Practice Act of Illinois, *Illinois Revised Statutes* (1977) chapter 110, section 57.1, declare that Solo is entitled to insurance coverage and benefits from defendant Federal for the ultimate net losses incurred from said occurrences of discrimination alleged by the GSA on behalf of 72 female Solo employees in the initial placement of them by Solo in cup packing area positions.

2. Order Federal to pay Solo the sum of $3,750.00 to reimburse Solo for its payment of fees for legal services rendered and costs through the date hereof, in the defense of the pending claim of GSA against it for occurrences of alleged discrimination.

3. Order Federal to defend Solo and to pay Solo all sums which Solo pays or is required to pay as a result of the pending claim of GSA against Solo.

4. Order Federal to pay Solo interest on all amounts this Court determines to be due from Federal to Solo from June 22, 1977, at the statutory rate.

5. Order Federal to pay Solo its reasonable attorneys fees incurred in this action.

6. Grant Solo such other relief as this Court may deem proper.

December 18, 1978

Solo Cup Company

by: _____
Shayle P. Fox

_____
Russell M. Kofoed
its attorneys

FOX AND GROVE
Suite 7818
233 S. Wacker Drive
Chicago, Illinois 60606
(312) 876-0500

PROOF OF SERVICE BY MAIL

I, Russell M. Kofoed, certify that I served this Amended Complaint by mailing a copy to John G. Guy at One E. Wacker Drive, Floor 38, Chicago, Illinois 60601 and depositing the same in the U.S. mail at 233 S. Wacker Drive, Chicago, Illinois 60606 at 11:30 a.m. on December 18, 1978, with proper postage prepaid.

/s/ Russell M. Kofoed
Russell M. Kofoed

FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

SOLO CUP COMPANY, a corporation,

Defendant.

CIVIL ACTION NO. C 76-806A

COMPLAINT
JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f) (1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. Section 2000e. *et seq.* (Supp. II. 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of Georgia and the Northern District.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706 (f) (1), 42 U.S.C. Section 2000e- 5(f) (1).

4. Since at least July 2, 1965, Defendant, Solo Cup Company (hereinafter, the "Company"), has continuously been and is now a Delaware corporation, doing business in the State of Georgia and City of Atlanta, where it is engaged in manufacturing cups and paper goods and shipping them among the several states, and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701 (b) (g) and (h) of Title VII. 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this lawsuit, a person claiming to be aggrieved filed charges with the Equal Employment Opportunity Commission alleging violations of Title VII by Defendant All conditions precedent to the institution of this lawsuit have been fulfilled.

7. Since July 2, 1965, and continuously up until the present time, Defendant Company has intentionally engaged in unlawful employment practices at its Atlanta, Georgia facility, in violation of certain provisions of Title VII. These violations include, but are not limited to the following:

1. Failing and refusing to promote women based on sex;
2. Compensating women at a lower rate than men for substantially the same work;
3. Maintaining job classifications segregated on the basis of sex;
4. Having different terms and conditions of employment for women based on sex; and
5. Discharging women in retaliation for exercising protected rights under Title VII.

8. The effect of the policies and practices complained of in paragraph (7) above has been to deprive women of equal employment opportunities and otherwise adversely affect their status as employees because of their sex.

PRAYER FOR RELIEF

WHEREFORE, The Commission respectfully prays that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, agents, employees, successors, assigns and all persons in active concert or participation with it from engaging in any employment practice which discriminates because of sex.

B. Order Defendant to institute and carry out policies, practices and affirmative action programs which provide equal employment opportunities for women, and which eradicate the effects of its past and present unlawful employment practices.

C. Order Defendant to make whole those persons adversely affected by the unlawful employment practices described herein, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of its unlawful employment practices.

D. Grant such further relief as the Court deems necessary and proper.

E. Award the Commission its costs in this action.

Respectfully submitted,

ABNER W. SIBAL
General Counsel
WILLIAL L. ROBINSON
Associate General Counsel
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
2401 "E" Street, N.W.
Washington, D.C. 20506
/s/ Donald L. Hollowell
DONALD L. HOLLOWELL
Assistant General Counsel

/s/ Roger J. Martinson
ROGER J. MARTINSON
Supervisory Trial Attorney

/s/ Laverne S Tisdale
LAVERNE S. TISDALE
Trial Attorney

/s/ Cheryl P. Smith
CHERYL P. SMITH
Trial Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
ATLANTA REGIONAL OFFICE OF GENERAL COUNSEL
1389 Peachtree Street, N.E.,
Suite 101
Atlanta, Georgia 30309

UMBRELLA EXCESS LIABILITY POLICY

Policy No. FXL 77860406

FEDERAL INSURANCE COMPANY

. . .

Item 1. Named Insured Solo Cup Company, Etal. (See Endt. #5)

. . .

Item 2. Policy Period From 1-1-74 To 1-1-77

. . .

Item 3. Premium: $13,500.00

Item 4. Limit of Liability—as per Insuring Agreement II.

(a) Limit in respect of each occurrence $10,000,000.00

(b) Limit in the Aggregate for each Annual Period where applicable.... $10,000,000.00

(c) Retained Limit ..... $ 10,000.00

Issued at Chicago, Illinois(Date) January 24, 1974

. . .

FEDERAL INSURANCE COMPANY . . .

Agrees with the Insured named in the declarations made a part hereof, in consideration of the payment of the premium, and in reliance upon the statements in the declarations and subject to the limit of liability, exclusions, conditions and other terms of the policy.

INSURING AGREEMENTS

1. Coverage

The company hereby agrees, subject to the limitations, terms and conditions hereinafter mentioned, to indemnify the insured for all sums for which the Insured shall become obligated to pay by reason of liability

(a) imposed upon the Insured by law

or (b) assumed under contract or agreement by the Named Insured and/or by any officer, director, stockholder, partner or employee of the named insured, while acting in his capacity as such,

for damages direct or consequential and expenses, all as more fully defined by the term "ultimate net loss", on account of:

(i) Personal Injuries, including death at any time resulting therefrom,
(ii) Property Damage,
(iii) Advertising Liability,

caused by or arising out of each occurrence happening anywhere in the world.

2. Limit of Liability

The Company shall only be liable for the ultimate net loss the excess of either

. . . or (b) the retained limit as stated in Declaration 4(c) in respect of each occurrence not covered by said underlying insurances (hereinafter called the "underlying limits": . . .

THIS POLICY IS SUBJECT TO THE FOLLOWING DEFINITIONS . . .

2. Personal Injuries The term "Personal Injuries" wherever used herein means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliaton; also libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any Advertising activities.

. . .

5. Occurrence The term "Occurrence" wherever used herein shall mean an accident or a happening or event or a continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, property damage or advertising liability during the policy period. All such exposure to substantially the same general conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. Ultimate Net Loss The term "Ultimate Net Loss" shall mean the total sum which the Insured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, property damage or advertising liability claims, either through adjudication or compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder, excluding only the salaries of the Insured's or of any underlying insurer's permanent employees.

The Company shall not be liable for expenses as aforesaid when such expenses are included in other valid and collectible insurance.

. . .

Date issued 1-24-74 Endorsement No. 1

Insured Solo Cup Co. etal. Policy No. FXL 77860406 . . .

SUPPLEMENTARY PAYMENTS

IT IS AGREED THAT, WITH RESPECT TO ANY OCCURRENCE NOT COVERED BY THE UNDERLYING POLICIES LISTED IN THE SCHEDULE OF UNDERLYING INSURANCE, BUT COVERED BY THE TERMS AND CONDITIONS OF THIS POLICY EXCEPT FOR THE AMOUNT OF RETAINED LIMIT SPECIFIED IN ITEM 4(C) OF THE DECLARATIONS, THE COMPANY SHALL:

(A) DEFEND ANY SUIT AGAINST THE INSURED ALLEGING SUCH INJURY OR DESTRUCTION AND SEEKING DAMAGES ON ACCOUNT THEREOF, EVEN IF SUCH SUIT IS GROUNDLESS, FALSE OR FRAUDULENT; BUT THE COMPANY MAY MAKE SUCH INVESTIGATION, NEGOTIATION AND SETTLEMENT OF ANY CLAIM OR SUIT AS IT DEEMS EXPEDIENT;

. . .

ALL OTHER TERMS AND CONDITIONS NOT INCONSISTENT HEREWITH REMAIN UNCHANGED.

. . .

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOLO CUP COMPANY,

Respondent,

vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHAYLE P. FOX
CHRISTOPHER A. BLOOM
233 South Wacker Drive
Suite 7818—Sears Tower
Chicago, Illinois 60606
(312) 876-0500

Attorneys for Respondent

Of Counsel:
FOX AND GROVE, CHARTERED

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED

Whether Seventh Circuit's the interpretation of an insurance policy under Illinois law, which admittedly applies to this case, erroneously found the insurer liable.

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No. 80-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOLO CUP COMPANY,

Respondent,

vs.

FEDERAL INSURANCE COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Solo Cup Company, respectfully opposes issuance of a writ of certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered April 11, 1980, reported at 619 F.2d. 1178 (7th Cir., 1980). A., pp. 1a-17a.[1]

[1] References to pages of the Appendix to the Petition for Writ of Certiorari are referred to in the form "A.____"

SUMMARY OF ARGUMENT

This case does not present any of the grounds for review set forth in Rule 17 of the Rules of this Court. The sole issue presented here involves the interpretation of an insurance policy under Illinois law. The Seventh Circuit's opinion conflicts with no decision by the Illinois Supreme Court nor any decision by any other Circuit. Furthermore, the decision below does not conflict with any decision by this Court and presents no question warranting review.

REASONS FOR DENYING THE WRIT

1. The primary contention of the Petition is that the court below "impermissibly conferred" upon Respondent an "advantage denied a plaintiff in the Courts of Illinois". Pet. Cert., pp. 5-8. The Court of Appeals, however, expressly applied Illinois law in this case and based upon its interpretation of Illinois authority, concluded that "under Illinois law, Federal [the Petitioner] has breached its duty to defend its insured in the action." A., pp. 9a, 13a.

The Petitioner seeks, therefore, only to contest whether the Court of Appeals, admittedly applying the correct law, reached the correct conclusion. This is not an issue warranting review. Indeed, the Petition refers to no contrary decision by the Illinois Supreme Court whereas the court below followed two established Illinois Supreme Court cases: *Maryland Casualty Company* v. *Peppers,* 64 Ill.2d 187, 355 N.E.2d 24 (1976), and *Pioneer Insurance Company* v. *Alliance Insurance Company,* 374 Ill. 576, 586, 30 N.E.2d 66, 71-72 (1940), A., p. 5a. Clearly, the decision of the Court of Appeals does not "violate the command of this Court in *Erie* [v. *Tompkins,* 304 U.S. 64 (1937)]". Pet. Cert., p. 8.

2. Petitioner also mistakingly asserts that the decision below is contrary to decisions of this Court because the lower

court "ruled necessarily though not expressly that the consequences or effects of discrimination in a disparate impact case are 'unintentional' . . ." Pet. Cert., pp. 8-10. The court below did not so rule and did not have to so rule to hold for Respondent. The Seventh Circuit interpreted only the Petitioner's insurance policy not Title VII.[2] Whether the Respondent's acts were intentional or unintentional may be relevant under Title VII; but not under that insurance policy which required for coverage only that the results, and not the acts, be unintentional.[3]

The court below did find that "since disparate impact liability [under Title VII] does not require proof of discriminatory *motive*, and since [Petitioner] Federal has, moreover, conceded that the policy covers at the least some types of disparate impact claims, we therefore hold that the disparate impact claim which could have been proven under the allegations of the underlying complaint was a claim potentially within the coverage of the policy." A., p. 13a (emphasis added; footnote omitted). Such a finding is not inconsistent with the decisions of this Court, none of which has ever required a finding of discriminatory *motive* for a Title VII violation.[4]

To the contrary, this Court has consistently held that if disparate impact is found, liability for discrimination under

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[2] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 20003, *et seq.;* herein referred to as "Title VII".

[3] Relevant excerpts from the insurance contract are as follows:

"Personal injuries" is defined to include "Discrimination". "Occurrence", which is a covered event, is defined as " . . . an event or a repeated exposure to conditions which unexpectedly and *unintentionally results in personal injury*". (emphasis supplied).

[4] As decided by this Court, "disparate impact" cases analyze the validity of employment practices which are facially neutral in form but discriminatory in operation. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977).

Title VII does not require any finding of intent. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430, for example, this Court held:

> "Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained . . ."

And, further stated,

> "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms . . ."

Id. at 432. The court below did not deviate from this principle and surely did not, in resolving only the applicability of a particular insurance policy, "radically . . . amend Title VII." Pet. Cert., p. 10.

3. Permitting insurance against losses arising from discrimination does not encourage discrimination any more than fire insurance can be said to encourage fires or automobile insurance to encourage accidents. Rather, such a policy provides a fund to alleviate the effects of proven discrimination when an employee might otherwise be economically unable to do so.[5]

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[5] The Seventh Circuit found insurance for "disparate impact" cases under Title VII would further, not deter, the policies of Title VII:

> [T]he fact of insurance may be helpful toward achieving the desirable goal of voluntary compliance . . . [C]omplex analyses of employment standards, while apparently necessary in order to ensure that an employer's policies do not needlessly place a stumbling block in the way of women or minorities, may well become, as a practical matter, beyond the financial capabilities of all but the largest employers. The involvement of insurance in the field might, however, ease the burden on smaller employers by making claim prevention services available on a cost effective basis to help employers evaluate their employment standards. Workmen's compensation insurers have, by way of analogy, no doubt helped prevent numerous employee injuries, and it is not undesirable, nor inconceivable, that discrimination insurers might aid in preventing the injury of discrimination as well.

A., pp. 14a-15a.

No public policy, Illinois or Federal, prohibits insurance against intended acts which unintentionally cause injury such as Title VII "disparate impact" cases.[6] The general public policy prohibiting contracts which could extend coverage to the knowledgeable or criminal wrongdoer is not applicable here.[7]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[6] See, e.g., *Union Camp Corp.* v. *Continental Casualty Co.*, 452 F.Supp. 565 (S.D. Ga. 1978), which in accord with the decision below, held that providing insurance coverage for Title VII liability is not contrary to public policy.

[7] *Hartford Life Insurance Co.* v. *Title Guarantee Co.*, 520 F.2d. 1170 (D.C. Cir. 1975); COUCH ON INSURANCE, 2d § 136 (Supp., 1979).

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(Emphasis added)

I.

Erie Was Disregarded

Respondent appears to make three answers to petitioner's contention that the court of appeals failed to follow *Erie,* Res. Br. 3: (1) the court of appeals did apply Illinois law; (2) *Erie* does not require that a federal court sitting in diversity correctly apply state law; and (3) *Erie* does not require a federal court sitting in diversity to follow decisions of the state's intermediate courts. None of these answers has merit.

First, *Ladd Construction Co.* v. *Insurance Company of North America,* 73 Ill. App. 3d 43 (3d Dist. 1979) states

Illinois law as to a casualty insurer's duty to defend suits seeking equitable relief. Under *Ladd* Federal had no duty to defend. It is apparent from the failure of the court of appeals to mention or explain its disregard of *Ladd* that that court declined to follow Illinois law.[1]

Second, it would make a nullity of *Erie* to say that a federal court is free to misapply state law or that this court has no interest in assuring the correct application of state law in diversity cases. Where clear error is charged, this court does not hesitate "to determine whether the Circuit Court of Appeals *correctly* applied" state law, *Wichita Royalty Co.* v. *City National Bank,* 306 U.S. 103, 104 (1939) for the "rights . . . reserved by the Constitution to the several states", *Erie* v. *Tompkins,* 304 U.S. 64, 80 (1938) are no less transgressed by misapplication of local law then by outright disregard of that law. Indeed, so strong is the requirement that state law be correctly applied in diversity cases that this court requires federal appellate tribunals to conform judgments under review to changes in state law which have occurred after entry of judgment by the district court. *Huddleston* v. *Dwyer,* 322 U.S. 232, 236 (1944); *Meredith* v. *Winter Haven,* 320 U.S. 228, 237 (1943); see also *Nolan* v. *Transocean Air Lines,* 365 U.S. 293 (1961).

Third, in the absence of a controlling decision by the highest court of the state, federal courts are bound to follow decisions of intermediate appellate courts of the state. *Fidelity Union Trust Co.* v. *Field,* 311 U.S. 169 (1940); *West* v. *American Telephone & Telegraph Co.,* 311 U.S. 223 (1940); *California* v. *Taylor,* 353 U.S. 553 (1957); *Jones* v. *Schellenberger,* 225 F2d 784, 790-791 (7th Cir. 1955), *cert. denied,* 350 U.S. 989 (1956), where, as here, those decisions are not in conflict with other decisions of

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[1] Notably, respondent also fails to mention *Ladd.*

the state's highest court and the federal court can point to no persuasive reason for believing the state's highest court would decide otherwise.

II.

The Decision Below Conflicts With Griggs, et al.

Respondent also errs in saying, Res. Br. 3, no interpretation (and hence no wrong interpretation) of Title VII was made by the court of appeals. To reach this conclusion respondent argues that the question of whether Title VII proscribes intentional discrimination was not addressed below but instead can be and was separated from the question of whether the policy in issue covers the discrimination alleged. That is not so. The only charge made by the underlying EEOC complaint concerns *intentional* practices under Title VII, App. 41a. If, as petitioner urges, disparate impact practices are, under the reasoning in *Griggs* and *Albermarle*, a species of *intentional* discrimination, Federal could have no duty to defend since its policy covered only *unintentional* occurrences. In holding that Federal was obligated to defend, the court of appeals necessarily held that Title VII imposes liability for unintentional discrimination. This departure from settled rulings of this court warrants review.

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